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No. 81-2332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL GOVERNORS' ASSOCIATION, THE STATE OF WISCONSIN AND THE NATIONAL ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

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Pursuant to Rule 36 of the Supreme Court of the United States, the U.S. Conference of Mayors, the National Governors' Association, the State of Wisconsin and the National Association of Counties hereby move for leave to file a brief *amici curiae* in the above-captioned proceedings, and in support thereof state:

1. The decision of the U.S. Court of Appeals for the Fourth Circuit, in providing relief to Respondent, appears deficient in its analysis of the relationship of the common law to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601 *et seq.*, in that it misreads both the language of the Act and the intent of Congress as they relate to matters in derogation of the common law.

2. The decision will have far reaching consequences for the States and Territories and for the cities and counties of America, virtually all of which have undertaken significant economic and community development projects which included the use of federal grant-in-aid funds to effect their result. If allowed to stand, the decision below may well result in vast, new and unanticipated liabilities which included the use of federal grant-in-aid funds to

3. The Fourth Circuit's decision reflects a substantial change in the construction of the Act, and *amici* intended to demonstrate in their brief that the decision conflicts with notions of cooperative federalism.

4. This case presents important issues of law of direct and immediate concern to the members of *amici*, the fifty States, the Territories and the nation's cities and counties.

5. Accordingly, the *amici* seek this opportunity to make known their views to the Court and to attempt to assist the Court in its review of the merits of this case.

6. Counsel for *amici curiae* has sought, but was unable to secure, consent to file the attached brief *amici curiae* from Respondent.

Counsel for *amici curiae* hereby requests that the Court grant this Motion to File Brief *Amici Curiae* of the U.S. Conference of Mayors, the National Governors' Association, the State of Wisconsin and the National As-

sociation of Counties, and that the attached brief be accepted as part of the record in this case.

Respectfully submitted,

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THE INTEREST OF THE AMICI CURIAE

The *amici*, the U.S. Conference of Mayors, the National Governors' Association, the State of Wisconsin and the National Association of Counties, represent State and local governments throughout the United States. In addition to their concern over the substantial effect the decision below will have on the City of Norfolk and its Redevelopment and Housing Authority, the *amici* are troubled that State and local governments in all parts

of the United States will be facing claims, both retroactive and current, for relocation assistance from public utilities. This development, resulting solely from the interpretation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 by the United States Court of Appeals for the Fourth Circuit, is at variance with long lines of cases under the common law and will effectively obviate long-settled patterns and practices established by State legislatures for the allocation of costs for relocation of public utility facilities between taxpayers and ratepayers through the use of legislative oversight authority over municipalities and public utility rate setting commissions.

The decision below will bring about a fundamental change in the interpretation of federal and State law and responsibilities. Major changes in intergovernmental responsibilities should not occur without some clearer statement of Congressional intent. The re-channeling of funds dedicated to various public purposes to pay unanticipated relocation costs for public utilities will cause undue hardship to State and local government budgets in a time when they are under severe fiscal distress.

This change, and the retroactive and current costs associated with it, and the loss of State and local control over important aspects of public utility franchising, will adversely affect the fifty States, the Territories and the nation's cities and counties. Accordingly, the *amici* seek to represent the interests of their members in this case. A detailed statement as to each *amicus* follows:

The United States Conference of Mayors: The Conference is an organization of city governments represented through their chief elected officials, Mayors. It was organized in 1932 to promote the causes of the cities and to foster responsible, informed and effective relationships between city halls and the federal government. By limiting its membership to cities of over 30,000 in population, the Conference of Mayors represents the needs of

larger cities. Of the 800 cities eligible for membership in the Conference, over 480 are full members, including virtually all cities of over 100,000 in population. Petitioner, NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, works closely with the city and Mayor of Norfolk, Virginia. The City of Norfolk is a full and active member of the Conference of Mayors and the Mayor of Norfolk, Vincent J. Thomas, serves as chairman of the Conference's standing Committee on Community Development, Housing and Economic Development.

The National Governors' Association: NGA is an incorporated instrumentality of the States, whose members are the chief elected officials of the fifty States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the territories of the Virgin Islands, Guam and American Samoa. The National Governors' Association joins this *amici* brief on behalf of all its members, and is specifically joined by the State of Wisconsin.

The Governors' Association is concerned about the impact that the novel decision of the Fourth Circuit will have nation-wide as the URA affects some fifty federal programs administered by over twenty federal agencies. In addition, some forty-one States have adopted relocation statutes similar to the URA, or permit compliance with the terms of the Act.

The State of Wisconsin by its Attorney General: The State has an interest in the determination of this case as it affects the State both in its sovereign role as a direct participant in rural and economic development and in State road and park and recreation programs, among others. The State also files on behalf of the interest of its cities, counties and other local governments that could be adversely affected by the decision below. The State is concerned about the possible unforeseen and unconsidered consequences of the Fourth Circuit's decision which runs

directly counter to the State's legislative policy of cooperative and joint uses of public rights-of-way under franchises, permits and agreements.

The National Association of Counties: NACo is the only national organization representing county government in the United States. Its membership spans the spectrum of urban, suburban and rural counties which have joined together for the common purpose of strengthening county government. NACo member county governments cover over 85% of the U.S. population. Counties, much like cities and States, undertake a vast array of development projects that are supported, in part, by federal program funds. As such, the Fourth Circuit's construction of the URA would have disruptive and costly impacts on county governments.

SUMMARY OF ARGUMENT

The United States Fourth Circuit Court of Appeals has held that monopoly public utilities can be "displaced persons" within the meaning of Title II of the Uniform Relocation Assistance Act ("URA"). The decision misreads the structure and intent of the URA. In enacting Title II of URA, Congress only intended to create rights, in derogation of common law, for persons suffering "disproportionate injuries" because of federally financed activities. Monopoly public utilities do not suffer such injuries.

1. Congress never intended that *all* parties displaced by federal activities should be entitled to relocation assistance. Congress intended only to protect persons on whom relocation was particularly burdensome. When Congress has intended to protect public utilities, as it has under other statutes, it has explicitly stated that intent. There is no such statement in Title II.

2. The Fourth Circuit's decision reflects serious misconceptions of the role that the URA plays in the inter-

governmental system. It conflicts with the URA's fundamental statutory objective of promoting cooperation, certainty and predictability in intergovernmental programming. The decision also reverses established law and practice governing the relationships between State and local governments and monopoly public utilities. It will lead to inestimable retroactive and prospective costs that will take dollars from the fulfillment of other public purposes and will disrupt planning and financing of needed public works and redevelopment.

Congress, which made no statement indicating that monooply public utilities should be covered by the URA, cannot by its silence have willed such coverage when the result would be a drastic reallocation of public resources from vital governmental purposes to monoply public utilities.

ARGUMENT

I. CONGRESS ADOPTED THE URA TO BENEFIT PERSONS AND BUSINESSES WHO WERE DISPROPORTIONATELY INJURED BY RELOCATION. BECAUSE PUBLIC UTILITIES ALREADY HAVE UNIQUE LEGAL PROCEDURES AND PRIVILEGES PROTECTING THEIR INTERESTS, CONGRESS DID NOT INTEND TO PROVIDE THEM WITH RELOCATION BENEFITS.

A. The City of Norfolk, and the Norfolk Redevelopment and Housing Authority, undertook an urban renewal project in 1975. Pursuant to that project, transmission lines and equipment of the Chesapeake and Potomac Telephone Company of Virginia ("C. & P."), were transferred from one publicly owned right-of-way, to which the Company had received free access, to another publicly owned right-of-way, to which it also received free access. In this case C. & P. seeks relocation payments under Title II of the Uniform Relocation Assistance Act ("URA"), 42 U.S.C. §§ 4601 *et seq.*, because of the transfer from one

free right-of-way to another. It asserts that this transfer made it a "displaced person" under 42 U.S.C. § 4601(6).

C. & P.'s argument is without merit. In its recent decision in *Alexander v. U.S. Department of Housing and Urban Development*, 441 U.S. 39 (1979), this Court ruled that, in enacting the URA, "Congress did not expect to provide assistance for all persons somehow displaced by Government programs." 441 U.S. at 60. Here, Congress "did not expect to provide [relocation] assistance" payments to utilities which operate in monopoly markets and recoup their costs through state sanctioned rate structures. Rather, Congress intended to provide relocation assistance to individuals and small businesses who suffer "disproportionate injuries" from forced relocation, 42 U.S.C. § 4621.

That individuals and small businesses which are disproportionately harmed are the intended beneficiaries of Congress' effort is manifested in the legislative history of the URA. The House Report stressed that governmental programs had placed inequitable and even catastrophic burdens on some citizens in urban areas:

> . . . As the thrust of the Federal and federally assisted programs have shifted from rural to urban situations, it became increasingly apparent that the application of traditional concepts of valuation and eminent domain resulted in inequitable treatment for large numbers of people displaced by public action. When applied to densely populated urban areas, with already limited housing, the result can be catastrophic for those whose homes or business must give way to public needs. The result far too often has been that a few citizens have been called upon to bear the burden of meeting public needs.

The Report went on to state that Congress was providing humanitarian assistance to those in need.

> It provides a humanitarian program for relocation payments, advisory assistance, assurance that comparable, decent, safe, and sanitary replacement hous-

> ing will be available for displaced persons prior to displacement, economic adjustments, and other assistance to owners and tenants displaced from their homes, farms and places of business. . . . And, perhaps most important of all, it gets to the heart of the dislocation problem by providing the means for positive action to increase the available housing supply for displaced low and moderate income families and individuals. H.Rep. No. 91-1656, reprinted in 1970 U.S. Code Cong. and Admin. News, pp. 5851-2.

The trial court recognized that Congress intended to assist individuals and small businesses, not monopoly public utilities which recoup their costs through their rates.

> We believe that it is those unprotected, unfranchised corporations and businesses which were contemplated by Congress under the Uniform Relocation Act. A utility company . . . serving these redeveloped areas under its franchise is not called upon to compete. Its rates are established by petitions to the State Corporation Commission which takes into consideration the accounting data essential to the life of the utility and fixes a rate to cover its costs and expenses. On the other hand, a Mom and Pop business, a grocery store, a retail furniture outlet, for instance, which is subjected to the sudden trauma of being forced to relocate elsewhere must do so under competitive conditions in which it cannot realistically raise the price of its products to cover extraordinary relocation costs. It must compete in the market place against competitors beyond the redeveloped area who have no such cost to recoup. These are the "persons," "businesses," "displaced persons," to which the Uniform Relocation Assistance Act extends its largesse." *Chesapeake & Potomac Telephone Company v. Landrieu* (U.S.D.C., E.D. Va., 1981, Reprinted in Pet. Cert., pp. B 1-12, at 11 and 12.)

As pointed out by the trial court, there is a major contrast between public utilities on the one hand, and the persons and small businesses which Congress sought to protect on the other. Public utilities have monoply

markets with guaranteed rates of return, access to public rights-of-way when relocating and ample financial resources with which to relocate. Individuals and small businesses that Congress wished to aid lack the resources needed to move or to secure adequate replacement quarters. Congress intended only to ameliorate the intractable conditions faced by those who lacked resources.

B. That Congress did not feel it necessary, and did not intend, to aid utilities is emphasized because it legislated against a known background of common law and State statutory rules that already provided valuable protections for utilities. Several studies commissioned by Congress and a select committee on relocation assistance had studied this background, under which utilities receive free access to rights-of-way, recovery of costs through rate structures and, in some cases, even relocation payments.[1] (A short history of Congressional review of relocation problems is found in the legislative history, H.Rep. No. 91-1656, 1970 U.S. Code, Cong. and Admin. News, p. 5851); and see, *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency*, 101 Idaho 30, 607 P.2d 1084 (1980); *New Orleans Gaslight Co. v. Drainage Commissioner of New Orleans*, 197 U.S. 453 (1905); and 12 McQuillin, *Municipal Corporations*, § 34.74a (3rd ed. 1970). In the URA, Congress manifested no desire to affect the state common law and statutory matrix concerning relocation payments to public utilities. To the contrary, Congress intended to leave to States the decision on whether utilities should receive such payments. Thus it was that, after enacting the URA, Congress, acting as the local legislature for the District of Columbia, specifically enacted a law providing that District of Columbia utilities shall receive relocation payments. D.C. Public Utilities Reimburse-

[1] This combination of benefits is obtained by no other type of business. The situation of utilities thus differs from that of any other industry.

ment Act of 1972, P.L. 92-495, 86 Stat. 812. Such law was wholly superfluous if the URA already mandated these payments. Moreover, when Congress acting as the national legislature *has* intended to affect relocation payments to utilities, it has explicitly stated its desire. For example, in the Federal Aid Highway Act of 1958, 23 U.S.C. § 123, Congress explicitly stated that federal monies could be used to "pay for the cost of relocation of utility facilities." There is no comparable statement in the URA. The lack of a comparable statement evinces a lack of comparable intent.[2]

In conclusion, after years of study, Congress adopted a scheme for paying relocation assistance that preserves the common law with regard to utilities. The Court should be hesitant to rule that a well informed Congress, by its silence in the URA, sought to effect a wholesale revision in the common law concerning utility relocation payments. There is no meaningful construction of the term "displaced person" which includes utilities and meshes with traditional common law rules. Nor, as previously shown, is there any meaningful construction of the term "disproportionate injuries" which can include businesses with the rights and benefits enjoyed by monopoly public utilities.

II. THE DECISION OF THE FOURTH CIRCUIT WILL HAVE HIGHLY ADVERSE, UNFORESEEN CONSEQUENCES FOR STATE AND LOCAL GOVERNMENTS AND FOR THE INTERGOVERNMENTAL SYSTEM.

A. The Court has just this Term recognized that large-scale federally supported programs require certainty, predictability and continuity. In *North Dakota v.*

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[2] It is noteworthy that, though Congress explicitly provided in the 1958 Act that federal monies *could* be used for relocation payments to utilities, it nonetheless left it to State common law and statutes to determine whether monies *would* be used for this purpose. It thus recognized, as is re-echoed in the URA, that the decision on relocation payments to utilities is a State decision.

United States, —— U.S. ——, 51 U.S.L.W. 4240 (1983), the Court noted that a comprehensive program "could not take place overnight; careful planning over many years was anticipated. . . . A detailed federal program involving the estimate of needs, setting of priorities, allocation of funds, and negotiations with landowners," should not be subject to interpretations which would negate the purposes of the statute. 51 U.S.L.W. at 4244.

These requirements are equally applicable to the large-scale redevelopment projects affected by the URA. The State or local agency undertaking such a project must be able to proceed with certainty and predictability in planning, financing and implementation of the program. The URA has contributed to all of these purposes. It is for this reason that *amici*, and their members, Mayors, Governors and County Officials, have consistently supported the URA. The decision of the Fourth Circuit, however, will have a particularly disruptive impact on the planning and financing of redevelopment projects.

First, there is no statute of limitations in the URA. Thus, utilities will be able to seek reimbursement for projects that were drawn up as long ago as 1970. This retroactivity will upset long established plans, and will thereby create great, unforeseen financial hardships for States and cities which have completed redevelopment projects and which are unable to apply for additional federal funds to pay the utilities' relocation expenses.[3]

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[3] Had cities such as Norfolk suspected that they might have to make large relocation payments to utilities, they would have planned for this *ab initio* by seeking additional funds, reducing the total size of the project or other measures. But no one having envisioned the possibility of payments to utilities, the planning and financing process took no account of such expenditures; yet now, cities and States will be saddled with large and disruptive liabilities. Cf., *North Dakota v. United States*, *supra*, at 4244; *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, at 24 (1981).

The same disruptive results will obtain for projects which are currently in progress but for which it is too late for States and cities to apply for additional federal funds because the financing process is closed. And, uncertainty will attend even those current projects for which it is still possible to apply for more funds: whether federal funds will, in fact, be available is unclear, and it is thus uncertain whether States and cities will have to reduce the total size of renewal projects, and/or increase their own financial contributions, in order to make monies available for relocation payments to utilities.

Second, Congress clearly intended that the URA help effectuate the goals of other federal programs. See, H. Rep. No. 91-1656, *supra*, 1970 U.S. Code Cong. and Admin. News at 5852. The unforeseen result of the Fourth Circuit's decision, however, will be to siphon funds that otherwise would be used to carry out other public purposes and programs from grant programs or from State and local treasuries to recompense public utilities for moving from one free public right-of-way to another free public right-of-way.

B. This Court's recent decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) is instructive in this case. In *Pennhurst* the Court interpreted a statute that "was designed as a cooperative program of shared responsibilities" between the federal government and State and local governments. 451 U.S. at 22, citing *Harris v. McRae*, 448 U.S. 297. The Court stressed a respect for the principles of federalism and recognized that States possess a right to choose the extent of their involvement in federal programs. It thus held that, if Congress intends to saddle States with large, indeterminate liabilities when they participate in a program, then it must explicitly state the conditions attached to the program. 451 U.S. at 24.

The need for a more definite Congressional statement is even more compelling here than under the statute re-

viewed in *Pennhurst*. The URA is an obligatory program attaching to virtually all federal grants, but no new or additional funds are provided to grant recipients under the URA to comply with its terms. It merely authorizes the expenditure of federal funds from other grant programs. In *Pennhurst*, at least some funds were available to the States under the statute at issue to effect the statute's goals. Here, States and local governments will be required to supply most of the funds. If Congress had intended this result, it should have stated that requirement explicitly. *Pennhurst, supra*; cf. *Rothstein v. Wyman*, 467 F.2d 226, 235 (CA 2, 1972) *cert. den.*, 411 U.S. 921 (1973).

As shown above, in Title II of the URA Congress intended to help the truly needy. It knew the common law and statutory rules regarding relocation payments to utilities, and gave no indication of a desire to change this matrix. Until C. & P. sought relocation payments, utilities did not seek reimbursement under the URA. Until the Fourth Circuit's decision, it was not thought that such reimbursement could be had. Planning and financing proceeded under the opposite assumption. The Fourth Circuit's decision, twelve years after the URA was enacted, will produce great financial disruption for State and local governments and will siphon funds that otherwise would be used for statutorily expressed public purposes.

Such results as these are in direct conflict with the teachings of *Pennhurst*. The Court there said that Congress "must speak with a clear voice [so as to] enable States to exercise their choice knowingly, cognizant of the consequences of their participation." 451 U.S. at 22. There is no such clear statement supporting the position espoused by Respondent.

CONCLUSION

For all the foregoing reasons, the Court of Appeals' decision in this case should be reversed by this Court.

Respectfully submitted,

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